Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

GARRY J. LOWERISON,
Petitioner,

v.

COUNTY OF SAN DIEGO, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GARRY J. LOWERISON
Pro se

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QUESTIONS PRESENTED

Congress passed the full faith & credit statute in 1790. This is how the Supreme Court has read the statute. The Court has made clear that, in cases where the statute applies, "Congress has specifically required all federal courts to give preclusive effect to state-court judgements whenever the courts of the State from which the judgments emerged would do so. . . ." As required by Congress (now codified as 28 U.S.C. § 1738), (Article IV sec. 1) and made clear by the Supreme Court the following questions are presented:

1. Will this Court give Full Faith & Credit to a Final Judgment rendered and affirmed in a State Court?

2. Since the State has no power to authorize the Respondents to violate the United States Constitution, does this Court have the lawful authority to permit the Respondents to deprive a State Judge to exercise his legal right to authority?

3. Is it not imperative that the Constitution be peremptory to all courts and if not, this court will rectify the error to assure the rights of the State and the people shall not be trespassed upon, as prescribed by the X Amendment pursuant to the Fifth Article of the original Constitution?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to the proceedings in the court of appeals.

OPINIONS BELOW

The Ninth Circuit Court of Appeals denied the Petition for Rehearing on March 21, 2002. The Ninth Circuit Court of Appeals issued its Memorandum on January 17, 2002 and is unreported. The United States District Court for the Southern District of California issued its Order granting Defendant's Motion for Summary Judgment on May 17, 2000 and it is unreported. The United States District Court for the Southern District of California issued its Order Granting in Part and Denying in Part Defendants' Motion for Partial Summary Judgment on March 8, 2000 and it is unreported.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its order in this case March 21, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

United States Constitution, Article IV, section 1

Act of May 26, 1790 (now codified as 28 U.S.C. § 1738)

X Amendment Ratified (1791)

STATEMENT OF THE CASE

Petitioner on December 3, 1998 filed suit in San Diego State Court against the County of San Diego and Deputy Yavno alleging both state-based tort claims and violations of his federal civil rights persuant to 42 U.S.C. § 1983. On January 13, 1999, the County of San Diego with Yavno's consent, removed Petitioners state court action to federal

court. On Sepetember 14, 1999 Petitioner, moved to compel the production of documents (Pitchess Motion). On September 29, 1999 the County ("Respondents") moved for partial summary on the principle ground that Petitioner pled guilty May 6, 1998 to an amended complaint. December 3, 1999, Magistrate Cynthia Aaron granted in part Petitioners motion to compel but the Respondents did not release the documents until the third week of Feduary 2000.

Petitioner moved in opposition to Respondents motion for partial summary judgment. Petitioner entered the State of California's Final Judgment rendered and affirmed on June 8, 1998 in a court of law, Honorable Judge William Draper presiding.

On March 6, 2000, the district court granted the Respondents motion for partial summary judgment but failed to address the states final judgment entered by the Petitioner.

On April 13, 2000, Respondents moved for summary judgment on remaining causes of action. Petitioner moved in opposition to Respondents motion for summary judgment and requested oral argument which was granted and held on May 15, 2000. May 17, 2000, district court granted the Respondents motion.

The courts ruling decided that a jury would agree with Respondents to an issue of fact pertaining to excessive force.

October 10, 2000, Petioner filed an informal brief to the 9th Circuit Court of Appeals presenting the issue of the district court erred by not giving Petitioners State of California's Final Judgment "full faith and credit".

On January 17, 2002, the 9th Circuit Court of Appeals affirmed the district court ruling and ignored Petitioner's issue of "full faith and credit" by not even mentioning the fact a June 8, 1998 Final Judgment does exist.

On Febuary 27, 2002, Petitioner filed for rehearing arguing the court has no right to change the law. March 21,2002 petition for rehearing was denied.

ARGUMENT

INTRODUCTION

Thus far, petitioner ("Lowerison") has been ill-served by the Federal Courts justice system.

Following a routine traffic stop for minor vehicle equipment infractions - for which no corrective action was subsequently required - Lowerison was subjected to the unconstitutional method of operation by Yavno a San Diego County Deputy Sheriff. Compounding Yavno's constitutional violations was the indifference of the respondents San Diego County ("County") to the probability that such a constitutional tort would occur, as evidenced by the County's prior knowledge involving Yavno.

Lowerison brought a civil rights action against the Respondents. An action based on the State of California's findings which included a (final judgment) that was rendered and affirmed in a state court of law June 8, 1998 Honorable Judge William Draper presiding and California Department of Motor Vehicles driving record of Petitioner.

The district court released Petitioners counsel then instead of considering this as a disadvantage did the exact

opposite by ignoring Petitioners evidence completely or construed it narrowly.

The County and Yavno (collectively, "Respondents") in their moving papers for partial summary judgment insisted Petitioner entered into a plea bargain May 6, 1998 in which Petitioner pled guilty.

Petitioner in opposing papers, introduced compelling evidence that being the final judgment rendered and affirmed on June 8, 1998.

Without addressing or any comment whatsoever, took no notice of Petitioners evidence instead the district court based its decision on the Respondents erroneous documents and declarations.

Petitioner requested oral argument to the Respondents motion for summary judgment on the remaining causes of action. At the hearing May 15, 2000, the Court again was informed of the Final Judgement and that Petitioner did not plead guilty.

Petitioner proceeded Pro-Se appealing the district courts ruling before the Ninth Circuit Court of Appeals. Petitioner's informal brief raised the issue of the states final judgment not given "full faith and credit" by the courts. Again the courts ignore the issue presented and no evidence suggests Petitioner pled guilty in state court, as the Ninth Circuit implied in its Memorandum.

REASONS FOR GRANTING WRIT

As this Court will be presented with the Petitioners Final Judgement rendered and affirmed in State Court and the

California Department of Motor Vehicles printout of Petitoners record with the State. This being conclusive evidence the granting of this Writ would be for the preservation of the law.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-55918
D.C. No. CV-99-00054-IEG (CGA)

[Filed March 21, 2002]

GARRY J. LOWERISON, Plaintiff- Appellant,	)
v.	)
COUNTY OF SAN DIEGO; WILLIAM YAVNO, Defendants - Appellees.	)

ORDER

Before: SCHROEDER, Chief Judge, TROTT and RAWLINSON, Circuit Judges.

The panel has voted unanimously to deny Appellant's Petition for Rehearing. Accordingly, the Appellant's petition for rehearing, filed on February 27, 2002, is DENIED.

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-55918
D.C. No. CV-99-00054-IEG

[Filed January 17, 2002]

GARRY J. LOWERISON,	)
Plaintiff- Appellant,	)
	)
v.	)
	)
COUNTY OF SAN DIEGO;	)
WILLIAM YAVNO,	)
Defendants - Appellees.	)
	)

Appeal from the United States District Court
for the Southern District of California
Irma E. Gonzalez, District Judge, Presiding

Argued and Submitted November 6, 2001
Pasadena, California

Before: SCHROEDER, Chief Judge, TROTT, and RAWLINSON, Circuit Judges.

MEMORANDUM*

Appellant Garry J. Lowerison ("Lowerison") appeals the district court's grant of summary judgment in favor of Appellees, the County of San Diego ("County") and Sheriff's Deputy William Yavno ("Yavno"), on Lowerison's 42 U.S.C. § 1983 and state law claims. Lowerison's claims are predicated on a traffic stop initiated by Yavno. Lowerison contends that Yavno used excessive force by applying handcuffs too tightly. The district court also refused to grant Lowerison's third request for additional discovery.

Excessive Force

Lowerison admitted that Yavno did nothing to hurt him "physically as far as pain goes," and that Yavno only touched him and guided him. Lowerison complained to Yavno about tight handcuffs only one time, while Yavno was driving to the station. Lowerison failed to raise a genuine issue of material fact regarding excessive force, and thus the district court properly granted Appellees' motion for summary judgment. *Little v. Windermere Relocation, Inc.*, 265 F.3d 903, 915 (9th Cir. 2001).

False Arrest

Lowerison asserts a false arrest claim, on the basis that Yavno lacked probable cause for Lowerison's arrest. Lowerison is collaterally estopped from asserting lack of

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

probable cause for his arrest, because the state court's denial of Lowerison's motion to suppress evidence precludes relitigation of the false arrest issue. *Ayers v. City of Richmond*, 895 F.2d 1267, 1270 (9th Cir. 1990). Lowerison contends that because there was doubt about the judgment in the criminal proceeding, the motion to suppress was "not essential to the final judgment in the criminal proceeding" and was "not fully and finally litigated." However, the motion to suppress was an integral part of the criminal proceeding. Lowerison's argument is unpersuasive.

Lowerison's guilty plea also estops him from asserting lack of probable cause for his arrest. Lowerison argues that Appellees waived the affirmative defense of collateral estoppel by failing to specifically plead it. Affirmative defenses are not waived even if they are first raised in pretrial dispositive motions, if the plaintiff is not unfairly surprised or prejudiced. *See Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993). Because Lowerison has failed to establish surprise or prejudice, Appellees did not waive the affirmative defense of collateral estoppel.

Malicious Prosecution

Lowerison's malicious prosecution claim against Yavno fails because no material issue of fact exists regarding the independent authority of the prosecutor to proceed with charges. *Nadell v. Las Vegas Metropolitan Police Department*, 268 F.3d 924, 929 (9th Cir. 2001).

Destruction of Property

Lowerison contends that Yavno damaged equipment in Lowerison's truck, and also damaged his truck.[1] Yavno presented evidence that there was "no major damage" to the vehicle when it left his control. Lowerison's conclusory statements are insufficient to defeat summary judgment. *Magana v. N. Mariana Islands*, 107 F.3d 1436, 1447-48 (9th Cir. 1997). Additionally, claims which are "not specifically and distinctly argued and raised in a party's opening brief are waived." *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) (citing *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1110 n.1 (9th Cir. 2000) (en banc)).

In any event, if California has an "adequate post deprivation remedy," Lowerison is barred from bringing a § 1983 claim. *Barnett v. Centoni*, 31 F.3d 813, 816-17 (9th Cir. 1994) (per curiam). California law does provide such a remedy. *Id.* Accordingly, Lowerison is not entitled to relief on his property damage claim.

Falsification of Evidence

Lowerison failed to raise a question of fact regarding his falsification of evidence claim. Lowerison offered absolutely no evidence that Yavno tampered with Lowerison's blood sample. Yavno detailed the handling of the blood test tube, tracing its location from the nurse who drew the sample,

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[1] Lowerison could not see which items, if any, Yavno picked up when he was bending over Lowerison's truck during the search, because Yavno did not lift items up high enough for Lowerison to see over the bed walls of the truck.

to the evidence refrigerator where Yavno left it to be tested according to procedure. Summary judgment was proper as to this claim.

Discovery Request

The district court's denial of Lowerison's request for further discovery is reviewed for abuse of discretion. *Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151, 1161 n.6 (9th Cir. 2001). Lowerison had the burden of proffering sufficient facts to make clear "what further discovery would reveal that is 'essential to justify . . . opposition' and prevent summary judgment." *Nicholas v. Wallenstein*, 266 F.3d 1083, 1088 (9th Cir. 2001) (quoting *Program Eng'g, Inc. v. Triangle Publ'ns, Inc.*, 634 F.2d 1188, 1194 (9th Cir. 1980)). The district court noted that Lowerison failed to "specify what, if any additional documents" he sought to uncover through discovery. The district court acted within its discretion in denying Lowerison's third request for additional discovery.

For the reasons stated above, this Court affirms the district court's grant of summary judgment in favor of Appellees.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 99-0054-IEG (CGA)
[Doc. No. 47]

[Filed May 17, 2000]

GARRY J. LOWERISON, Plaintiff,

vs.

COUNTY OF SAN DIEGO; et al., Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants County of San Diego ("County") and William Yavno ("Yavno") bring the instant motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons stated herein, the Court grants defendants' motion.

BACKGROUND

On December 3, 1998, plaintiff Garry J. Lowerison ("Lowerison") commenced this action against the County, Yavno, and thirty unnamed "Doe" defendants in San Diego Superior Court, alleging several violations of federal law under 42 U.S.C. § 1983, along with a host of state common-law tort claims. The alleged infractions stem from an incident in which Yavno, a San Diego County Sheriff's Deputy, stopped and detained Lowerison for ostensible traffic violations, and subsequently brought Lowerison into police custody on a purported, suspicion of drug use. In his complaint, Lowerison alleged that defendants intentionally violated his civil rights by (1) stopping him in his truck without reasonable suspicion, (2) wrongfully arresting and detaining him, (3) searching his truck without probable cause, (4) destroying his property, (5) using excessive and unreasonable force during the arrest, (6) falsely imprisoning him, (7) falsifying blood sample evidence, and (8) maliciously prosecuting him. He further alleged state-based causes of action for (1) negligence, (2) negligent infliction of emotional distress, (3) intentional infliction of emotional distress, (4) trespass to chattel and (5) false arrest and imprisonment. Based on the presence of federal question jurisdiction, defendants removed Lowerison's suit to this Court on January 13, 1999.

On September 29, 1999, defendants brought a motion for partial summary judgment attacking Lowerison's section 1983 claim. Specifically, defendants argued that (1) Lowerison had alleged insufficient facts to support a finding of County liability on the basis of Yavno's allegedly improper actions; (2) the earlier denial of Lowerison's motion to

suppress evidence at the state level collaterally estopped Lowerison from relitigating the probable cause issues in the instant proceedings; and (3) Lowerison's voluntary plea of guilty to state vehicle code violations negated his wrongful prosecution claim. On March 8, 2000, the Court issued an Order (1) granting defendants' motion as to all section 1983 claims against the County, (2) granting the motion as to all section 1983 claims against Yavno stemming from the alleged unreasonableness of his stop, search, arrest, and detention of Lowerison,[1] but (3) denying the motion as to the remaining section 1983 claims regarding wrongful destruction of property, excessive force, falsification of evidence, and malicious prosecution. All of Lowerison's state common-law tort claims against the County and Yavno remained intact.

On April 13, 2000, defendants filed the instant motion for summary judgment, claiming that Lowerison has failed to raise a triable issue of material fact regarding his outstanding federal claims against Yavno and all of his state claims against both defendants. The parties have filed responsive papers. The Court now considers defendants' motion.

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[1] Lowerison's wrongful imprisonment claim was precluded only to the extent that it relied on the unreasonableness of his initial arrest by Yavno, but not to the extent that his continued imprisonment was based on the allegedly falsified blood test.

DISCUSSION

A. Legal Standard

Summary judgment may be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is proper where "there is no genuine issue as to any material fact and... the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material issue of fact is a question which must be answered to determine the rights of the parties under the substantive law and must be answered by the jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993). A dispute is "genuine" only if "a jury applying [the substantive law's] evidentiary standard could reasonably find for either the plaintiff or the defendant." *Anderson*, 477 U.S. at 255. Moreover, "a party cannot create a genuine issue of facts sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement... without explaining the contradiction or attempting to resolve the disparity." *Cleveland v. Policy Management Sys.*, 526 U.S. 795, 806 (1999).

In considering a motion for summary judgment, the Court must examine all the evidence in the light most favorable to the non-moving party. *United States v. Diebold; Inc.*, 369 U.S. 654, 655 (1962). The moving party bears "the initial responsibility of informing the district court of the basis for its motion." *Celotex*, 477 U.S. at 323. To satisfy this

burden, the moving party must demonstrate that no genuine issue of material fact exists for trial. *Id.* at 322. However, the moving party is not required to negate those portions of the non-moving party's claim on which the non-moving party bears the burden of proof. *Id.* at 323. Once the moving party demonstrates that there is no genuine issue of material fact, the non-moving party must designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). The facts relied upon must be admissible under the rules governing the admission of evidence generally, including those concerning authentication, relevance, and hearsay. *Hal Roach Studios. Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550-52 (9th Cir. 1990).

B. Analysis

1. Yavno's Liability under Section 1983

Section 1983 provides, in relevant part, that any person who under color of law "subjects, or causes to be subjected, any citizen of the United States... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. Section 1983, however, "is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal citations omitted); *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). Thus, in order to prevail on a section 1983 claim, a plaintiff must demonstrate that (1) a person acting under color of state law committed the conductat issue, and (2) the conduct deprived the claimant of a right, privilege, or

immunity protected by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535(1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327, 328 (1986). In the instant case, Lowerison alleges that Yavno violated his constitutional rights by (1) fastening handcuffs on his wrists in an excessively tight manner and otherwise behaving menacingly during the arrest; (2) wrongfully damaging or destroying his personal property; (3) tampering with his blood sample so as to falsely indicate the presence of amphetamine; and (4) maliciously prosecuting him of two drug-related counts.[2]

a. Use of Excessive Force

The Fourth Amendment prohibition against unreasonable seizures applies not only to the initial decision to effectuate such a seizure, but also to the manner in which it is carried out. *Tennessee v. Garner*, 471 U.S. 1, 8 (1985). On this principle, the Ninth Circuit holds that excessively tight handcuffing of a suspect by a police officer may violate constitutional norms under certain circumstances. *Lalonde v. County of Riverside*, 204 F.3d 947, 960 (9th Cir. 2000); 9

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[2] At certain points in his opposition, Lowerison appears to re-allege his claims relating to Yavno's lack of probable cause to search and arrest him. (*E.g.*, Pla.'s Opp. ¶¶ 3-4; Pla.'s Decl. ¶ 1.) Since these claims were ruled out in the Court's Order of March 8, 2000 granting defendants' motion for partial summary judgment, they will not be addressed here. Similarly unavailing is Lowerison's apparent attempt to re-introduce the issue of County liability under 42 U.S.C. § 1983. (*E.g.*, Pla.'s Decl. ¶ 2.) To the extent that these allegations bear on the County's liability under *state* law, however, they will be discussed in Part B.2, *infra*.

F.3d 1433, 1436 (9th Cir. 1993). The determination of whether excessive force was used depends on the facts of each particular case, including (1) the severity ofthe crime at issue, (2) whether the suspect posed a threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to flee. *Lalonde*, 204 F.3d at 959. Further, a court should consider the severity of the injury inflicted, as well as the response of the officer to the suspect's complaints of pain. *Compare Palmer*, 9 F.3d at 1436 (finding both factors telling where officer refused suspect's request to loosen cuffs and suspect suffered bruises on wrists lasting for weeks), *and Ramirez v. City of Reno*, 925 F. Supp. 681, 687 (D. Nev. 1996) (denying summary judgment to officer where suspect alleged that cuffs caused "unbearable" pain, that he was pushed face-first into a pool of water by officer, and that he suffered multiple lacerations when he was subsequently dragged along the ground), *with Walker v. Benter*, 41 F. Supp. 2d 1067, 1076 (C.D. Cal. 1999) (awarding summary judgment to officer where suspect failed to show lasting physical injury or need for medical treatment).

In the instant case, the relevant factors appear to cut both ways. Certainly, Yavno had reason to believe that Lowerison might be dangerous at the time of the handcuffing, since Yavno legitimately believed that Lowerison was under the influence of a controlled substance, (Yavno Decl. ¶ 2), and Lowerison had just admitted that he was carrying a firearm in his truck, (Pla.'s Dep. at 208). On the other hand, Lowerison claims that he was not resisting arrest, attempting to flee, nor engaging in any threatening behavior. (Pla.'s Dep. at 208-09.) Rather, Lowerison attests that it was Yavno who was acting in an overly aggressive manner, based on Yavno's

verbal abusiveness and bullying demeanor. (Pla.'s Dep. at 212-14, 220, 227, 242, 254.) Despite Yavno's intimidating "body language," however, Lowerison concedes that Yavno did not strike him, use any sort of weapon on him, and only touched him when applying the handcuffs, assisting him in and out of the squad car, and escorting him around the Vista Detention Facility. (Pla.'s Dep. at 101, 208-09, 213, 244, 254-55, 262.) The only physical injury alleged by Lowerison was caused by the tightness of the handcuffs, which were "cutting his wrist." (Pla.'s Dep at 211.) Lowerison does not claim that he suffered any injury beyond his temporary discomfort as a remit, nor that he required medical attention afterwards.[3] Lowerison does contend that Yavno rudely refused to loosen his handcuffs, (Pla.'s Dep. at 220) ("[Yavno] told me that I better f'ing shut up or he's going to hog-tie me."), but he also admits that he waited for some time before making this request and did not repeat it thereafter, (Pla.'s Dep. at 220). In any event, Lowerison alleges nothing to suggest that the pain was "unbearable" or otherwise severe.

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[3] At the motion hearing held on May 15, 2000, Lowerison made reference (for the first time) to the medical report of a nurse who examined him shortly after his arrest. The nurse in question was apparently the same person who performed the blood test upon which Lowerison's falsification of evidence claim is based. *See* discussion *infra* Part B. 1.c. According to this report, Lowerison exhibited multiple abrasions to his left wrist at that time. While the nurse's observation may serve to corroborate Lowerison's assertion that the handcuffs were "cutting his wrist," it does not demonstrate that Lowerison was in any pain, that the injury was so severe as to require medical treatment, nor that such abrasions are out of the ordinary for someone who has been handcuffed.

C.f. Ramirez, 925 F. Supp. at 687; *Walker v. Benter*, 41 F. Supp. 2d at 1076.

Based on the totality of the circumstances, and especially the absence of any lasting injury, this Court concludes that no reasonable juror could find that Yavno used excessive force in executing the arrest and bringing Lowerison into custody. Although this Court does not condone Yavno's unpleasant behavior, mere boorishness by an arresting officer does not implicate any Fourth Amendment right to remain free from unreasonable seizures.

b. Destruction of Property

Presumably, Lowerison seeks to bring a claim against Yavno under either a due process or "takings" rubric for the Wrongful deprivation of his property. Lowerison makes several conclusory allegations that Yavno "destroyed" his personal property at some point during the arrest, (Pla.'s Opp. ¶ 5; Compl. ¶ 11, 13), although it is not at all clear *what* property was involved nor how it was damaged.[4] The

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[4] (At the May 15, 2000 motion hearing, Lowerison attested that Yavno destroyed the underside of his truck cab, ripped out his stereo and speakers, and then neglected to properly replace the protective covering on the bed of the truck, thus exposing Lowerison's tools to damage by the elements. Lowerison also claimed that his bail money has never been returned. Notably, Lowerison has not provided any competent evidence to support these claims. Yavno admits that he examined various items and objects in the bed of Lowerison's truck during the search, but denies having damaged anything. (Yavno Decl. ¶ 8.) Yavno further alleges that if anything was in fact damaged, such damage may have been caused by the private towing company that impounded

wholly speculative nature of Lowerison's claim is arguably sufficient to render his claim defective as a matter of law. Fed. R. Civ. P. 56(e) (requiring "specific facts showing that there is a genuine issue for trial."). In this instance, however, it is also the case that Lowerison does not allege having availed himself of the state or county procedure for obtaining a post-deprivation remedy.[5] *See generally* Cal. Gov't Code §§ 945 *et seq.* This defeats any due process claim since Lowerison cannot rightfully allege that the applicable state reimbursement procedures were inadequate. *Barnett v. Centoni*, 31 F.3d 813, 816-17 (9th Cir. 1994). Also, Lowerison cannot make out a takings claim because his action will not be ripe for consideration by a federal court until he resorts to the state process and is thereby denied just compensation. *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985). Yavno is therefore entitled to summary judgment on Lowerison's federal claim for destruction of property.

c. Falsification of Evidence

Neither party disputes that, on the day of the arrest, an independent nurse took a blood sample from Lowerison and that the sample subsequently tested positive for amphetamine

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Lowerison's truck after his arrest. (*Id.*)

[5] Lowerison clarified at the motion hearing that he has already brought an unsuccessful administrative claim for redress, but has not yet filed a state lawsuit on this issue. Lowerison's instant suit, although commenced in state court, cannot factor into this constitutional analysis since it will not resolve the underlying questions concerning state procedures.

use. (*E.g.*, Yavno Decl. ¶ 3.) This test was apparently used to justify and support the state criminal prosecution against Lowerison for driving and being under the influence of a controlled substance. (Gregg Decl. ¶ 3.) Lowerison claims, however, that Yavno "deviated from normal procedures" by demanding that the nurse give him the sealed vial containing Lowerison's blood sample, and then by delaying the refrigeration of that sample for approximately ninety minutes. (Pla.'s Opp. ¶ 1; Pla.'s Dep. at 92-93, 110.) Although Lowerison alternatively characterizes Yavno's action as a deliberate "tampering" and a negligent "contamination," only the former is actionable under 42 U.S.C. § 1983.[6] *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (holding that liability does not attach under section 1983 for merely negligent actions that fail to satisfy a reasonable standard of care).

Glaringly absent from Lowerison's account is any direct evidence that Yavno tampered with the blood, interfered with the testing of the sample, or otherwise caused it to register as positive for drug use. Lowerison's deposition indicates that the nurse gave the sealed vial to Yavno, that Yavno escorted Lowerison to a booking cell, and that Lowerison never saw Yavno or the vial thereafter. (Pla.'s Dep. at 93-94, 97.) Lowerison did not see Yavno or the nurse put anything besides his own blood into the vial, nor did he see any foreign material in the blood. (Pla.'s Dep. at 125.) Moreover, Lowerison has no personal knowledge as to what happened to the blood sample afterwards, and no one else provided him with any further information that would support a legitimate inference of foul play. (Pla.'s Dep. at 109-14.)

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[6] The Court will address the negligence issue in its discussion of Lowerison's state tort claims. *See* Part B.2 *infra*.

Yavno alleges that he did not alter or taint the blood in anyway, that he placed the vial in a refrigerated container after properly marking it for identification, and that he is not the person responsible for testing blood samples. (Yavno Decl. ¶¶ 4-5.) Thus, Lowerison's argument appears to rest solely on his own assertion that he was not under the influence of amphetamines at the time of his arrest. (*E.g.* Pla.'s Dep. at 111.) This is not sufficient to permit a reasonable factfinder to infer that Yavno was specifically involved in any falsification of evidence pertaining to the blood sample. Accordingly, the Court must grant summary judgment against Lowerison on this claim as well.[7]

d. Malicious Prosecution

In its earlier Order of March 8, 2000, this Court found that Lowerison's malicious prosecution claim was not precluded by his guilty plea to two minor traffic violations. (Order Gr. Part & Den. Part Def's Mot. Part. Summ. J. at 10-12.) The Court noted, however, that Lowerison had not yet established the necessary link between any actions by Yavno and the decision to prosecute him. (*Id.* at 12, n.8.) Lowerison still fails to draw this link, and now defendants present affirmative evidence that the County District Attorney's Office, not Yavno, had the sole authority to bring

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[7] To the extent that Lowerison's false imprisonment claim hinges on the alleged tainting of his blood sample, rather than any lack of probable cause supporting his arrest, this claim is likewise meritless. Furthermore, as a matter of fact, it appears that Lowerison did not spend any time in state custody, beyond that which was justified by his initial arrest, on account of the blood test. (Neagles Decl. ¶ 3.)

criminal charges against Lowerison. (Yavno Decl. ¶ 7; Gregg Decl. ¶ 3-4; *see also* Cal. Gov't Code § 26500.)[8] Since Yavno could not have been the determining force behind any malicious prosecution of Lowerison, Lowerison's claim fails as a matter of law.

None of Lowerison's section 1983 claims are sufficiently supported so as to create a triable issue of material fact. Hence, these claims cannot survive summary judgment.

2. Defendants' Liability under State Law

To a large degree, the Court's resolution of Lowerison's state-based tort claims echoes that of his federal claims. In his complaint, Lowerison alleged liability on the part of Yavno and the County under theories of (1) negligence, (2) negligent infliction of emotional distress, (3) intentional infliction of emotional distress, (4) trespass to chattel, (5) and false arrest and imprisonment. In response, Yavno has invoked his statutory grant of discretionary immunity under California law, which applies to injuries caused by public employees, intentionally or negligently, in the exercise of their discretion. Cal. Gov't Code § 820.2; *see also Reynolds v. County of San Diego*, 858 F. Supp. 1064, 1074 (S.D. Cal. 1994), *modified on other grounds*, 84 F.3d 1162 (9th Cir. 1996). The touchstone of the discretionary

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[8] Even if Lowerison had properly named the County District Attorney as a defendant, there is nothing to suggest that the prosecutor in Lowenson's case had any knowledge or reason to believe that the evidence against Lowerison may have been obtained impermissibly.

immunity analysis is the reasonableness of the officer's conduct. *Reynolds*, 858 F. Supp. at 1074-75.

Here, the Court has already determined that Yavno's actions were reasonable with respect to stopping, arresting, detaining, and searching Lowerison, as well as the level of force used during the arrest. Any claim for negligence pertaining to the contamination of Lowerison's blood sample, as noted above, suffers from the absence of any causal relation between Yavno's conduct and the incriminating test result.[9] Lowerison's state-based "trespass to chattel" claim, similar to his federal takings claim, is *insufficiently* pleaded. It is also precluded by the operation of Cal. Gov't Code § 945.4, which requires the presentation of claims for money damages against a public entity to that entity's governing body before suit may proceed against the sovereign. Finally, as to any state claim arising from the decision to prosecute Lowerison, it is clear that Yavno had no involvement in this decision.[10] Thus, Yavno cannot be liable under state law.

Lowerison does not articulate any special way in which the County might be liable for the aforementioned state-based torts, aside from its capacity as Yavno's employer. (*E.g.*, Pla.'s Decl. ¶ 2.) Since all state claims against Yavno

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[9] Additionally, Lowerison does not explain why any delay in refrigerating the sample, even if accepted as true, would have led to a positive test result.

[10] As a further dispositive matter, public prosecutors enjoy absolute immunity from suit for malicious prosecution under California law, notwithstanding actual malice or a lack of probable Cause, pursuant to Cal. Gov't Code § 821.6.

have been found to be precluded by discretionary immunity, so must all state claims against the County on a respondeat superior theory be similarly precluded. *Martinez v. County of Los Angeles*, 47 Cal. App. 4th 334, 350 (1996) (citing Cal. Gov't Code § 815.2); *Price v. County of San Diego*, 990 F. Supp. 1230, 1247 (S.D. Cal. 1998) (same).

CONCLUSION

For the foregoing reasons, the Court **GRANTS** defendants' motion for summary judgment as to all remaining claims. Lowerison's section 1983 claims against Yavno as to excessive force, wrongful destruction of property, falsification of evidence, and malicious prosecution, along with all of his state tort claims against the County and Yavno, are hereby **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

DATED: May 16, 2000

/s/ _____
IRMA E. GONZALEZ, Judge
United States District Court

cc: Magistrate Judge Cynthia G. Aaron
All parties

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 99-0054-IEG (CGA)
[Doc. No. 15]

[Filed March 8, 2000]

GARRY J. LOWERISON, Plaintiff,	)
vs.	)
COUNTY OF SAN DIEGO; et al., Defendants.	)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants County of San Diego ("County") and William Yavno ("Yavno") bring the instant motion for partial summary judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons stated herein, the Court grants in part and denies in part defendants' motion.

BACKGROUND

On December 3, 1998, plaintiff Garry J. Lowerison ("Lowerison") commenced this action against the County, Yavno, and thirty unnamed "Doe" defendants in San Diego Superior Court, alleging a host of state-based tort claims, along with several violations of federal law under 42 U.S.C. § 1983. The alleged infractions stem from an incident in which Yavno, a San Diego County Sheriff Deputy, stopped and detained Lowerison for ostensible traffic violations and subsequently brought Lowerison into police custody on a purported suspicion of drug use. In his complaint, Lowerison alleged, inter alia, that defendants intentionally violated his civil rights by (1) stopping him in his truck without reasonable suspicion, (2) wrongfully arresting and detaining him, (3) searching his truck without probable cause, (4) destroying his property, (5) using excessive and unreasonable force during the arrest, (6) falsely imprisoning him, (7) falsifying evidence against him, and (8) maliciously prosecuting him. Based on the presence of federal question jurisdiction, defendants removed Lowerison's suit to this Court on January 13, 1999.

On September 29, 1999, defendants brought the instant motion for partial summary judgment. The following facts appear to be undisputed. On December 7, 1997, in Vista, Cafifornia, Yavno pulled over a Ford pickup truck driven by Lowerison, purportedly on the grounds that (1) the truck was extended too far into the intersection (Cal. Veh. Code § 21453), (2) there was a vertical crack in the windshield obstructing the driver's view (Cal. Veh. Code § 26710), (3) the driver made a right hand turn without signaling (Cal. Veh. Code § 22107), and (4) the rear license plate taillight was defective (Cal. Veh. Code § 25950(b)). After a brief

interaction, Yavno concluded that Lowerison was under the influence of a controlled substance and therefore arrested him. Yavno detained Lowerison, searched his truck, and then brought him to the Vista Detention Facility. At the facility, County authorities obtained a blood sample from Lowerison, which allegedly tested positive for amphetamine use.

On January 7, 1998, Lowerison was arraigned on a misdemeanor complaint charging him wil one count of driving under the influence of a controlled substance in violation of Cal. Veh. Code § 23152(a), and one count of being under the influence of a controlled substance in violation of Cal. Health & Safety Code § 11550(a). Lowerison pleaded not guilty to both counts. On March 30, 1998, Lowerison filed a motion to suppress evidence pursuant to Cal. Penal Code § 1538.5 on the grounds that (1) his initial detention and arrest was not supported by probable cause, and (2) his implied consent for chemical testing was illegitimately obtained by way of this unlawful arrest. On April 14, 1998, the state court held a hearing on Lowerison's motion, at which both parties examine witnesses and presented oral argument. The judge denied the motion. On May 6, 1998, Lowerison pleaded guilty to two traffic violations – the cracked windshield under Cal. Veh. Code § 26710 and the defective taillight under Cal. Veh. Code § 25950(b) – and paid a fine.

In the instant motion, defendants attack only Lowerison's claim under 42 U.S.C. § 1983, leaving the state-based claims intact. Specifically, defendants contend that (1) Lowerison has alleged insufficient facts to support a finding of County liability on the basis of Yavno's allegedly improper actions, (2) the state judge's denial of the motion to suppress collaterally estops Lowerison from relitigating the probable

cause issues, and (3) Lowerison's plea of guilty to the two state vehicle code violations preclude him from now claiming that no such violation occurred. On February 22, 2000, Lowerison filed a timely opposition to defendants' motion, proceeding pro se, in which he also requested further discovery. Defendants replied on February 28, 2000. The Court now confiders defendants' motion.

DISCUSSION

A. Legal Standard

Summary judgment may be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is proper where "there is no genuine issue as to any material fact and... the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material issue of fact is a question which must be answered to determine the rights of the parties under the substantive law and must be answered by the jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993). A dispute is "genuine" only if "a jury applying [the substantive law's] evidentiary standard could reasonably find for either the plaintiff or the defendant." *Anderson*, 477 U.S. at 255. Summary judgment may be granted as to entire cases, particular claims, or specific issues of liability. *Compare* Fed. R. Civ. P. 56(a), (b) (stating that a party asserting a claim or defense may obtain summary judgment "upon all or any part thereof"), *with* Fed. R. Civ. P. 56(c) (stating that an interlocutory judgment may

be rendered "on the issue of liability alone"); *see also Robi v. Five Platters, Inc.*, 918 F.2d 1439, 1442 (9th Cir. 1990) (allowing summary adjudication of issues based on collateral estoppel theory)[1]

In considering a motion for summary judgment, the Court must examine all the evidence in the light most favorable to the non-moving party. *United States v. Diebold, Inc.* 369 U.S. 654, 655 (1962). The moving party bears "the initial responsibility of informing the district court of the basis for its motion." *Celotex*, 477 U.S. at 323. To satisfy this burden, the moving party must demonstrate that no genuine issue of material fact exists for trial. *Id.* at 322. However, the moving party is not required to negate those portions of the non-moving party's claim on which the non-moving party bears the burden of proof. *Id.* at 323. Once the moving party demonstrates that there is no genuine issue of material fact, the non-moving party must designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). The facts relied upon must be admissible under the rules governing the admission of evidence generally, including those concerning authentication, relevance, and hearsay. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550-52 (9th Cir. 1990).

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[1] To this extent, the Court rejects Lowerison's contention that "Defendants" Motion amount to an attempt to improperly carve out issues 'piecemeal' from various (unspecified) causes of action. (Pla. Opp. at 3.)

B. Analysis

1. Liability under Section 1983

Section 1983 provides, in relevant part, that any person who under color of law "subjects, or causes to be subjected, any citizen of the United States... to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. Section 1983, however, "is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal citations omitted); *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). Thus, in order to prevail on a section 1983 claim, a plaintiff must demonstrate that (1) a person acting under color of state law committed the conduct at issue, and (2) the conduct deprived the claimant of a right, privilege, or immunity protected by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327, 328 (1986). In the instant case, Lowerison alleges that defendants caused a deprivation of his Fourth Amendment protections against unreasonable searches and seizures, and his Fifth Amendment right to due process.[2]

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[2] Both Amendments are applied to state actors through the operation of the Fourteenth Amendment.

a. County Liability

The County may be held liable for injuries "inflicted pursuant to an official county policy or custom." *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989) (noting that a county cannot be held under a *respondeat superior theory)* (citing *Monell v. Dept. of Soc. Serv. of N.Y.*, 436 U.S. 658, 690-94 (1978)). Thus, Lowerison must show the existence of either (1) a formal governmental policy that led to the violation of his rights, *id.* at 1444, or (2) a longstanding practice or custom that it so "persistent and widespread" as to constitute a "permanent and well settled [county] policy." *Monell*, 436 U.S. at 691. Liability for an improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency, and consistency such that the conduct has become a traditional method of carrying out policy. *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996).[3] A county may also be held liable if it can be shown that an official with final policymaking authority either directly caused the constitutional violation[4] or consciously ratified the

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[3] Thus, a single incident of police misconduct, such as that alleged of Yavno, cannot sustain finding that the County had a "policy" of inadequately training its officers. *Oklahoma City. v. Tuttle*, 47 U.S. 808, 822 (1984).

[4] To this extent, it is theoretically possible that decisions by Yavno, acting in his official capacity as San Diego County Sheriff's Deputy, might cause liability to attach to the County. On the instant facts however, there appears to be no indication that Yavno has been vested with "final policymaking authority" as to when and how County officers should stop suspected perpetrators, make arrests, and bring prosecutions. Accordingly, his actions in

conduct of another so as to cause the violation. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion); *Gillette v. Delmore*, 979 F.2d 1342, 1347 (9th Cir. 1992).

Defendants argue that Lowerison has failed to offer competent evidence establishing the existence of a pervasive County policy or custom to violate his constitutional rights. In response, Lowerison submits five exhibits: (1) excerpts from the "Annual Report andSelected Final Reports of the 1991-92 San Diego County Grand Jury" ("Grand Jury Report"); (2) the San Diego County Charter ("County Charter"); (3) job descriptions for various levels of Deputy County Counsel positions; (4) five articles, ostensibly from local newspapers,[5] concerning misdeeds by the County Sheriff's Department; and (5) investigation reports pertaining to Yavno issued by the County Sheriff's Internal Affairs Division. (Lodg't Supp. Pla.'s Opp., Ex. 1-5.) Defendants object to all of these documents, save the County Charter, on grounds of lack of authentification, irrelevance, and hearsay and further argue that the documents to not meet the requirements for judicial notice. (Def's Obj. Pla.'s Ev. at 1-2.)

Assuming, arguendo, that the documents are authentic, the Court finds Lowerison's evidence to be unavailing. The

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his official capacity cannot be imputed to the County on this theory. The Court notes that this conclusion has no bearing on Yavno's potential liability in his *individual* capacity. *See* discussion *infra* Part B.1.b.

[5] Three of the articles cited by Lowerison contain no publisher information or date.

Court will address each exhibit in turn. The Grand Jury Report discusses numerous perceived problems within the County Counsel's office, but indicates nothing about problems with County Sheriff's Deputies such as Yavno, nor any tendency by the County towards wrongful prosecution of purportedly innocent persons such as Lowerison. (Lodg't Supp, Pla.'s Opp., Ex. 1, at 138-50.) As such, it is irrelevant to any material issue in the instant case. The Count Charter and job descriptions outline various county counsel and police functions, none of which include violating the civil rights of citizens. (Log't Supp. Pla.'s Opp., Ex. 2-3.) Thus contrary to Lowerison's assertions, these documents suggest that the County's policy is *not* to engage in actions of the sort attributed by Lowerison to Yavno.

As for the newspaper articles, the Court finds that these documents are clearly inadmissible hearsay for the purpose of establishing a County policy or custom under a *Monell* theory. *McAllister v. New York City Police Department*, 49 F. Supp. 2d 688, 705 n.12 (S.D.N.Y. 1999); *see also* Fed. R. Civ. P. 56(e). The documents may be admissible, however, to show that the County was on notice of allegations of misconduct by the Sheriff's Department, which could be relevant to Lowerison's position that the misconduct was deliberately ratified by a final policymaker of the County under a *Praprotnik* theory. *McAllister*, 49 F. Supp. 2d at 705 n.12 (citing *Carter v. District of Columbia*, 795 F.2d 116, 123 (D.C. Cir. 1986)). To raise an inference sufficient to defeat summary judgment, the alleged misconduct must be recent, credible, and similar, such that a reasonable Count decisionmaker would have known, or should have known, that subsequent civil rights violations were likely to

occur absent corrective action. *McClelland v. Facteau*, 610 F.2d 693, 697-98 (10th Cir. 1975).

Looking to the content of the articles themselves, the Court finds that none of the incidents reported therein meet this standard of recency, credibility, and similarity. The first article discusses a jury award rendered against the County based on its "deliberate indifference" to the false arrest of a Vista resident by a former County Sheriff's Deputy in violation of that person's constitutional rights. (Lodg't Supp. Pla.'s Opp., Ex. 4, at 1.) While the facts of the reported case are facially similar to Lowerison's, the alleged violation took place in 1985, which is far too remote to reasonably put the County on notice of potential violations in 1997, when Yavno's acts allegedly took place. The second article concerns a sexual assault allegedly committed by a County Sheriff's Deputy, (Lodg't Supp. Pla.'s Opp., Ex. 4, at 1), which is dearly too dissimilar to the charges in the instant case to be germane to the ratification analysis. The third and fourth articles involve the same false imprisonment verdict rendered against the County for a 1996 incident in which a man was wrongfully incarcerated based on a mistaken identification. (Lodg't Supp. Pla.'s Opp., Ex. 4, at 3-4.) While this case might be recent enough to put the County on notice of wrongful behavior, the corrective action to be taken by the County would be to ensure that photographs and fingerprints are properly matched by law enforcement personnel so as to role out such mistakes in the future. There is certainly no reason to believe that this incident would put the County on notice that its sheriff's deputies might detain drivers without probable cause, search and injure their person and property, and then bring false charges against them, as Lowerison alleges here. The fifth and final article reports on the

County's profiling of suspected gang members based on racial attributes, (Lodg't Supp. Pla.'s Opp., Ex. 4, at 5), which is not an issue in Lowerison's case. Since none of the articles indicate that the County was reasonably on notice of civil rights violations similar to those allegedly perpetrated by Yavno, these documents cannot sustain his claim against the County under a *Praprotnik* ratification theory.

The last set of documents submitted by Lowerison are five investigation reports on Yavno prepared by the County Sheriff's Internal Affairs Division between March 1994 and December 1997. (Lodg't Supp. Pla.'s Opp., Ex. 5.) Although some of the allegations made by the complainants in these reports are similar to those alleged by Lowerison, the Court finds it telling that Yavno was exonerated of all charges in the five incidents after a full investigation by Internal Affairs. (Lodg't Supp. Pla.'s Opp., Ex. 5, at 21,320, 345, 367, 418.) Not only do these documents tend to inculpate Yavno of prior wrongdoings, but they also demonstrate that the County has a policy or custom of investigating allegations of abuse by its officers so as to ensure that civil rights violations do not occur. Absent any argument or showing by Lowerison that the County Sheriff's Internal Affairs Division is itself remiss in executing its appointed tasks, the Court finds that the investigation reports do not implicate an illicit County policy or ratification of improper conduct by the County.

Since Lowerison has presented no evidence raising a genuine issue of material fact as to the County's liability, the County is entitled to summary judgment on all section 1983 claims.

b. Yavno's Liability in Individual Capacity

Lowerison also contends that Yavno may be held liable for his own acts or omissions. An individual may be held liable under section 1983 if (1) he or she was personally involved in the constitutional deprivation, or (2) a sufficient causal connection exists between his or her wrongful conduct and the constitutional violation. *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989). As to this claim, defendants do not allege that Lowerison has failed to make the requisite showing; rather, they make the more narrow argument that certain issues supporting his claim are barred by principle of collateral estoppel. First, defendants contend that Lowerison is estopped from relitigating the probable cause issues by the state court judgment on his motion to suppress evidence, which was unfavorable to his present position. Second, defendants assert that Lowerison is precluded from claiming that he was wrongfully prosecuted by his guilty plea to the two California vehicle code violations.

In order to determine the preclusive effect of a prior state court ruling, the Court must look at the collateral estoppel requirements of the state law. *Caldeira v. County of Kauai*, 866 F.2d 1175, 1177 (9th Cir. 1989) (holding that, even in section 1983 suits, federal courts are required to give same "full faith and credit" to state court judgments that such judgments would receive in state court system). Under California law, collateral estoppel bars parties from relitigating issues of fact or law that have already been fully and fairly litigated in prior proceedings. *Lumpkin v. Jordan*, 49 Cal. App. 4th 1223, 1229 (Ct. App. 1996). A party asserting collateral estoppel must demonstrate that (1) the factual or legal issue is identical to the issue that was

previously litigated; (2) the party to be estopped in the current action was in privity with a party in the former proceeding; (3) the issue was actually litigated in a the prior proceeding and was necessary to the judgment; and (4) there was sufficient motivation to fully litigate the issue in the prior proceeding. *Ayers v. City of Richmond*, 895 F.2d 1267, 1271 (9th Cir. 1990) (interpreting California law).

Regarding the prior state court proceedings on Lowerison's motion to suppress, the Court finds that all four criteria for collateral estoppel have been satisfied. First, the probable cause issues pertinent to the state court's suppression analysis are identical to those involved in the Fourth Amendment violations presently alleged by Lowerison. *See also Ayers*, 895 F.2d at 1271 (holding that standard on motion to suppressunder Cal. Penal Code § 1538.5 was identical to standard for urireasonable arrest under federal Constitution). Second, the privity requirement is satisfied insofar as Lowerison was a party to the first proceedings, and is now the party to be estopped. Third, the probable cause issue was fully litigated in the prior state hearing and was plainly essential to the judgment. Both parties attest, and the record supports, that the prior proceeding entailed the filing of sophisticated motion papers, production of witnesses, examination and cross-examination of those witnesses, questioning by the state court judge; and oral argument. (Lodg't Supp. Def's Mot. Part. Summ. J., Ex. 5-6; Lowerison Decl., Ex. 4.) The Court agrees with Lowerison, however, that the scope of this proceeding was limited to the reasonableness of Yavno's stop, search, arrest, and detention of Lowerison. As such, the preclusive effects of this earlier judgment only cover Lowerison's claims of (1) stop without reasonable suspicion, (2) unreasotmble arrest and detention,

(3) urtreasonable search without probable cause, and (4) wrongful imprisonment.[6] Collateral estoppel does not extend to Lowerison's unrelated claims of (1) wrongful destruction of property, (2) excessive force, (3) falsification of evidence, and (4) malicious prosecution. Finally, the Court finds that the charges involved in the suppression hearing, viz., being and driving under the influence of a controlled substance, were sufficiently serious to provide Lowerison with the proper motivation to litigate his motion rigorously. Thus, the state court's judgment denying Lowerison's motion to suppress estops Lowerison from relitigating the probable cause issue and all claims stemming therefrom.

Regarding Lowerison's prior guilty pleas, defendants appear to make two arguments. First, they claim that "Lowerison cannot now raise issues about the reasonableness of Yavno's reliance upon those California Vehicle Code violations as a basis for the detention." (Mem. P. & A. Supp. Def's Mot. Part. Summ. J. at 4.) This claim is undeniably true: insofar as Lowerison previously admitted guilt to these violations, he cannot now assert that they did not occur, so as to imply that Yavno's decision to stop and detain him was pretextual. Given the Court's instant finding on the preclusive effects of the earlier suppression hearing as to probable cause issues, however, defendants' claim is esseatially redundant. Defendants' second argument is more subtle: "If recovery of

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[6] The Court notes that Lowerison's wrongful imprisonment claim is precluded only to the extent that it relies on the unreasonableness of his initial arrest by Yavno. To the extent that his continued imprisonment was based on the allegedly falsified drug test rendered at theVista Detention Facility however, his claim is not precluded.

damages in an action under 42 U.S.C. § 1983 would necessarily imply that an earlier conviotion or a sentence is invalid, *there can be no cause of action* unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated through reversal or appeal or other proper ruling." (Mem. P. & A. Supp. Def.'s Mot. Part. Summ. J. at 4.) (emphasis added.) This goes beyond a simple issue preclusion argument; instead, defendants argue that a substantive element of Lowerison's malicious prosecution claim is negated by his earlier decision to plead guilty. Defendants cite *Heck v. Humphrey*, 512 U.S. 477 (1994), in support. In *Heck* the Supreme Court employed common law tort principles to reach the holding that a section 1983 plaintiff must prove that his conviction or sentence was invalid before the "injury" of plaintiffs conviction or imprisonment reaches constitutional proportions. *Id.* at 486-87. Since Lowerison has not shown the earlier conviction to be invalid, defendants claim, he cannot now maintain a cause of action under section 1983.

Despite the superficial appeal of defendants' argument, the Court submits that defendants misapply *Heck* to the present facts. The elements of malicious prosecution, under California common law, are (1) a judicial proceeding favorably terminated, (2) lack of probable cause, and (3) malicious intent. *Jaffe v. Stone*, 18 Cal. 2d 146, 149 (1941). The *Heck* decision dealt with the first element, which is designed to preclude wasteful parallel litigation on liability issues and to avoid the creation of two conflicting judicial resolutions arising out of the same transaction. *Heck*, 512 U.S. at 484. This rationale obviously precludes Lowerison from arguing that he was wrongfully prosecuted of the two traffic violations, but it does not preclude him from arguing

that he was wrongfully prosecuted of two counts of being and driving under the influence of a controlled substance. An actionable tort for malicious prosecution does not require that an individual actually go to trial and be acquitted of the crime charged; it is enough that the action be dismissed for a reason tending to indicate the innocence of the accused. *Jaffe*, 18 Cal. 2d at 150 (upholding actionable tort for malicious prosecution where plaintiff's criminal case had been dismissed for insufficient evidence); *Jackson v. Beckham*, 217 Cal. App. 2d 264, 270 (Ct. App. 1963) (same). Moreover, the injuries to the plaintiff, such as loss of reputation, the expense of defending the action, and physical and mental discomfort, may accrue upon the initiation of the unjustified criminal litigation. *Singleton v. Perry*, 45 Cal. 2d 489, 497-98 (1955); *cf, Heck*, 512 U.S. at 484 ("[A] successful malicious prosecution plaintiff may recover, in addition to general, damages, 'compensation for any arrest or imprisonment including damages for discomfort or injury to his health, or loss of time and deprivation of the society.'") (citations omitted).[7] In the instant case, the record does not indicate why the two drug charges against Lowerison were dropped Lowerison asserts that the dismissal was based on the state court judge's finding that Yavno had given false testimony on the matter. (Pla. Opp. at 2.) Although the Court cannot say at present whether this is in fact the case, it is clear that defendants have not adequately shown why Lowerison" prior guilty plea to traffic violations in any way precludes him from

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[7] The Court further notes that where a plaintiff is prosecuted on two charges, one justified and the other unjustified, the defendant – not the plaintiff – has the burden of showing that the plaintiff damages were attributable to the legitimate prosecution. *Singleton*, 45 Cal. 2d at 498.

establishing the "judicial proceeding favorably terminated" element of malicious prosecution on the charges of drug use.

As for the remaining two elements of the tort – lack of probable cause and malicious intent – the Court finds Lowerison's earlier guilty plea to be similarly irrelevant. Since Lowerison did not admit guilt as to his use of amphetamine, it is entirely possible that the decision to bring charges against him was motivated by some ill purpose. Furthermore, the earlier ruling on Lowerison's suppression motion does not negate the probable cause dement insofar as the state court did not reach the issue of whether the County's decision to bring the drug charges were themselves supported by probable cause, but only whether Yavno's initial search, arrest, and detention were so supported. Likewise, the state court did not reach the issue of whether the drug test administered at the Vista Detention Facility was reliable, only that Lowerison's implied consent to the test was validated by his lawful arrest. (Lodg't Supp. Def.'s Mot. Part. Summ. J., Ex. 5, at 4.) Thus, defendants have not adequately established any preclusion as to Lowerison's malicious prosecution claims pursuant to 42 U.S.C. § 1983.[8]

2. Lowerison's Request for Further Discovery

In his opposition to the instant motion, Lowerison claims that he is entitled to further discovery because "[t]o date, any internal records regarding policy of the County are

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[8] At this point, it is as yet unclear whether Yavno himself can be individually liable for these acts. Lowerison has not indicated who, within the County, is responsible for prosecutorial decisions.

within the exclusive possession and control of the County itself" (Pla.'s Opp. at 9.) The Court reminds Lowerison that the original date for the completion of discovery, set out in the Case Management Order on April 7, 1999, was October 8, 1999. This deadline has been extended twice since then. At present, Lowerison does not even specify what, if any, additional documents he seeks to uncover by way of discovery. Since good cause has not been established, the Court refuses to grant Lowerison any more time for discovery.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** defendants' motion for partial summary judgment as to (1) all section 1983 claims against the County, and (2) all section 1983 claims against Yavno stemming from the alleged unreasonableness of his stop, search, arrest, and detention of Lowerison, as specified in Part B. 1.b of this order. The Court **DENIES** defendants' motion for partial summary judgment as to Lowerison's section 1983 claims regarding wrongful destruction of property, excessive force, falsification of evidence, and malicious prosecution. The Court also **DENIES** Lowerison's request for further discovery.

IT IS SO ORDERED.

DATED: March 6, 2000 /s/ _____
Irma E. Gonzalez, Judge
United States District Court

cc: Magistrate Judge Cynthia G. Aaron
All parties

APPENDIX E

CALIFORNIA DEPARTMENT OF MOTOR VEHICLES
*****CUSTOMER RECEIPT COPY*****
DRIVER LICENSE/IDENTIFICATION CARD INFORMATION REQUEST
07/30/02

DAD99933596H6A0129686
DATE:07-30-02 TIME:I6:52*
DL/NO: A0129686*B/D:07-07-1952
NAME: LOWERISON GARRY JOHN*
ADDR AS OF 07-06-95:311 ESCONDIDO AVE, VISTA 92084*CC:37*

PULL NOTICE: NONE*

P&M CODE: NONE*

REVIEW DT: NONE*

COMMENT:
NO: MM PURGE:07-15 5960706952311 ESCONDIDO AVE VISTA CA92084126259607069528 5014 *

NO: MU PURGE:06-19 2350615996311 ESCONDIDO AVE VISTA CA92084 *

NO: IG PURGE:02-06 K30/ACC 121401/
FARMERS INS/99140660912/021802

ARREST REPORT SUBRECORD: NONE*

STATUS:
LIC/ISS:07-06-95 LIC/MLD:07-27-99
EXP:07-07-04 RBMI*
RESTR: NONE*

CLASS C NON-COMMERCIAL *
ENDORSEMENTS: NONE*
HEALTH QUESTIONNAIRE EXPIRES: NONE*
PREV LIC:CL C NON-COMML EXP/BD: 99
CERT: NONE
LATEST APP:MAG STRIPE RBM*ISS/
DATE:06-15-99 OFF:RBM*BATES: MAG*
PHOTO INFO:
:A- DL PHOTO ON VENDOR FILE*
LEGAL HISTORY: NONE*
ABSTRACTS: NONE*
FTP: NONE*
FTA: NONE*
ACCIDENTS:

DATE/TIME	LOCATION
12-14-01 99	OCEANSIDE

UPDATED: 02-18-02

* * * END * * *

VEH LIC ARC REPORT NO
6G59484

FR CASE NO
01-08-40943
REPT CODE: 1

596 073002 A1 5032 DIR $ 5.00

MUNICIPAL COURT OF CALIFORNIA
CASE NO. CN072334

FOLD-OUT

MUNICIPAL COURT OF CALIFORNIA, COUNTY OF SAN DIEGO, NORTH COUNTY JUDICIAL DISTRICT
325 S. Melrose Drive, Vista, CA 92083

PEO VS. LOWERISON GARRY J CASE NO. CN072334
CHARGE(s) VC26710 VC25950 DOB: 07-07-52
CUSTODY: OR

REPORTER: Backman/Cohen/Province/Tannen/ E WILLER INTERPRETER SWORN
Deputy District Attorney
D THOMPSON
Defense Counsel (Appt / TAD / Ret)
(X) Deft present without counsel (X) Deft. is not present.
DATE(s) 06-08-98 ( ) Cont. ( ) Vol.

( ) Defendant failed to appear / comply. Commit Warrant ordered for _____days. Schedule defendant for Court. No bail. ( ) warrant issued and notice mailed_____
( ) Bench Warrant ordered, bail set at $_____ /set aside/recalled_____ /cleared by arrest _____ ( ) Held to date set below.
( ) Defendant ordered to pay PC1214.1 Administrative Fee of $_____ by_____ ( ) Fee waived.
( ) COURT ( ) COUNSEL advised defendant of Constitutional rights. ( ) Reading of allegation(s) waived.
( ) DENIED allegation(s) of probation violation. ( ) PROBATION: ( ) remains ( ) summarily REVOKED.
( ) Defendant failed to comply with ( ) FCP ( ) MCP ( ) WRP ( ) COMM. SERVICE WORK ( ) FINE/FEES ( ) NEW VIOLATION ( ) OTHER

COUNSEL: ( ) RETAIN ( ) HP ( ) CAC, Atty _____ Apptd. ( ) Deft. advised of right to hearing re: eligibility to pay County for Atty fees. ( ) PRO PER, Court found defendant eligible, waiver incorporated.

CONVICTION: ( ) WITHDREW prior denial of probation violation.

( ) COURT ( ) COUNSEL advised defendant of the following rights and determined defendant understood and knowingly, voluntarily and explicitly waived * _____ counsel at all stages of the proceedings, *___ privilege against self-incrimination, *___ evidentiary hearing, *___ subpoena and confront witnesses against him.
( ) COURT determined. ( ) COUNSEL represented defendant understood the nature of the charge, the elements of the offense, and the consequences of an admission of the probation violation(s). ( ) Court took judicial notice of record ( ) Defendant admitted
( ) Court found probation violation(s) based on: Defendant paying fine
DEFENDANT WAIVED: NO ( ) arraignment ( ) time for judgment. ON CT 1 & CT 2 - FINE IS NO OBJECT

JUDGMENT: PROBATION: ( ) REVOKED ( ) REINSTATED ( ) TERMINATED ( ) CONTINUED ( ) same term & conditions ( ) NEW GRANT OF PROBATION, see ORDER.
( ) Probation time/ term extended to expire on _____ ( )Probation not to expire/terminate until fine/custody satisfied: TO BE CORRECTED
( ) MODIFIED as indicated below . ( ) See OTHER. ( ) All other terms & conditions of probation remain in full force & effect.
( ) SERVE_____ hrs/days CUSTODY of Sheriff_____ days susp., _____ days credit time served + _____ PC 4019 credits.
( ) Deft to be given additional credits pursuant to: (Yes)(No)PC4018/(Yes)(No)PC 4024
( ) SERVE_____ consecutive_____hr. commits. REPORT:_____AM/PM, RELEASE:_____AM/PM.
REPORT: ( ) forthwith ( ) on _____
(Orig._____+_____additional days custody). ( ) Concurrent ( ) Consecutive w/_____

OTHER
( ) RE-REFERRED TO: ( ) FCP/DHS ( ) MCP ( ) WRP /_____day(s) ( ) EYE/WRC Enroll/Contact by _____
( ) Drivers license: ( ) restricted ( ) suspended ( ) revoked for a period of _____
Defendant may drive to and from: ( ) FCP/MCP ( ) school/educational training, employment and ( ) during course of employment ( ) for any serious medical emergency.
( ) DELETE condition(s) for: ( ) FCP ( ) MCP ( ) WRP ( ) Fine ( ) Community Service Work ( ) _____
( ) IN LIEU OF: _____ ( ) credit time served _____
( ) CUSTODY in lieu of FINE: At request of defendant, (may) serve off fine in custody at $_____per day.
(X) Orig. fine bal. $ 300 : $_____ credit time served. ( ) Civil Assessment remains as set TOTAL Bal. Due $ _____
(X) FINE(s) payable to: (X) CLERK OF THE COURT: (X) forthwith, ( ) by_____ ( )Balance of Civil Assessment suspended
( )payable at the rate of $_____per month on-or-before the_____of each month commencing_____until paid in full, or appear in court if unable to pay on due date.
( ) IN LIEU OF: ( ) Fine ( ) Custody Deft may/must complete _____ ( ) COMMUNITY SERVICE at $_____ per hr.,
( ) PROOF of completion to Court by_____ ( ) WORK RELEASE - Call 560-3258 ( ) ENROLL by _____
( ) Pmts(of_____ to Court by _____

[redacted]

BAIL/BOND: ( ) Forfeited ( ) No further proceedings ( ) Fine from Bail, refund any bal. ( ) Declaration Non-Collusion/re-assumption liability filed
( ) Forfeiture set aside ( ) Reinstated ( ) Continued ( ) Exonerated ( ) No obj. by DA, hearing waived ( ) Upon $ _____
reinstatement fee paid to Court, purs. PC 1305 ( ) FEE WAIVED

ORDER/REFERRAL
( )Defendant ordered to report: ( )forthwith ( )by_____to:
( )CRO/Probation Dept. for report re: ( )Alcohol/Anger Management/Drugs/Testing/Domestic Violence Program
( )FRO/Probation Department/Revenue & Recovery/Collection Agency re:Fine & Fees/Restitution/Attorney Fees

( )Pay Attorney Fees of $_____PCC/APD/PD ( )Indigent as to Attorney Fees

JUDGE: ( ) Knaul ( ) Burley ( ) Ramirez ( ) Leeger ( ) Harris ( ) Earwicker (X) Draper ( ) Ryan ( ) Elias ( ) Sabraw ( ) Cassidy
By Stipulation: ( ) Judge ProTem: _____

I certify the foregoing is the true & correct record / (copy) of the proceedings held on the above date as ordered by the above named Judge / Commissioner.

CLERK OF THE ABOVE NAMED COURT By GV, Deputy

AGREEMENT OF DEFENDANT TO APPEAR PERSONALLY (PC 1318): I promise to appear at all times and places as ordered by the Judge or Magistrate before whom my proceedings are pending. I promise not to leave this State without prior approval of the Court. I waive my right to extradition if I fail to appear as required and am apprehended outside of this state. I understand that if I wilfully fail to obey the conditions of my release, I am guilty of an additional crime: MISDEMEANOR, if now charged with a misdemeanor, punishable by a $1,000 fine, 6 months in jail or both; FELONY, if now charged with a felony, punishable by up to 3 years in State Prison, 1 year in the County Jail, a fine of $5,000 or both.
I received a copy & understood the above order(s) & proceedings.

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Phone _____ Drv. Lic. # _____
Defendant's Signature Street Address City State Zip Code

BEST AVAILABLE COPY

APPENDIX F

LOWERISON V. COUNTY OF SAN DIEGO, ET AL., 99CV0054 DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, 5-15-00

TRANSCRIPT PAGE 27 FROM HEARING

[p. 27]

MR. LOWERISON: Well, I would first like to address the last thing that he said about Judge Rhodes on his decision that the cases that he's talking about involved a suspect that was not under arrest. That's the reason why that case was not, you know, in the favor of the plaintiffs in that case. He wasn't under arrest. He wasn't put under arrest, so he wasn't placed in the control of the deputies.

As far as Mr. Ligon saying I pled guilty to infractions, that is totally incorrect because I've got the judgment right here from Judge Draper, which definitely says there was no guilty plea here. And there were only Counts One and Two of vehicle infractions. It talked nothing about any guilty plea or any of the charges previously that the district attorney which wrote the declaration said that I pled guilty to.

THE COURT: So you did not plead guilty?

MR. LOWERISON: No, I did not.

THE COURT: What happened?

MR. LOWERISION: The case was dismissed and the district attorney, which he was talking about at the time, tried to have me plead guilty to amended violations. I didn't accept this, so I petitioned to go back and see Judge Draper, who was in charge of the motion to suppress, and he had Edwin Miller, the head district attorney, make out a new judgment which I signed and which Judge Draper signed, saying that the...